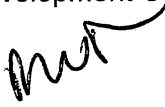


MEMORANDUM

TO: Planning and Economic Development Committee

FROM: Robert W. Oast, Jr. 

DATE: April 22, 2010

RE: Eminent Domain for Public Infrastructure

Members of City Council's Planning and Economic Development Committee (PED) have inquired about the City's use of the power of condemnation, or eminent domain, for public infrastructure purposes. I planned to make a verbal presentation on the subject at your April 20 meeting, but had to leave early due to a prior commitment at the League of Municipalities Legislative Planning Session.

N.C.G.S. 160A-240.1 provides that cities may acquire the title to property (or any lesser interest) by any lawful means, including by eminent domain, also known as condemnation. Eminent domain is the power that governments have to acquire private property for public purposes. The legal and theoretical justification for this power is that the government, in fulfilling its various public purposes, occasionally needs to acquire land in order to perform those functions, and should not be thwarted in this endeavor because it cannot acquire the necessary property; in essence, the needs of many citizens take precedence over the rights of one individual, and the government has the power to take land if necessary.

This power is not unlimited. Any governmental taking must be for a specified public purpose, and reasonable compensation must be paid. While the power of eminent domain was recognized at common law, most states, including North Carolina, now have a statutory framework for the exercise of eminent domain. Those laws specify the purposes for which eminent domain may be used, how eminent domain proceedings are conducted, and how the value of property taken is computed. North Carolina's eminent domain law is contained in N.C.G.S. Chapter 40A. This chapter applies to all local governments and most state departments; the Department of Transportation has its own procedure for acquiring land for highways. Municipalities are encompassed within the statutes as "local public condemnors."

"Infrastructure" may include different things, depending on circumstances, but most definitions include such facilities as streets, sidewalks, and utilities, that are considered essential to urban living. Increasingly, infrastructure also includes cable television, and internet service. Pursuant to N.C.G.S. 40A-3(b), the purposes for which cities, as local public condemnors may acquire property by eminent domain include: "(1) Opening, widening, extending where improving roads, streets, alleys and sidewalks. (2) Establishing, extending, enlarging or improving any of the public enterprises listed in G.S. 160A-311... (4) Establishing, extending, enlarging or improving storm, sewer and drainage systems and works, or sewer and septic lines and systems."

The list of public enterprises in N.C.G.S 160A-311 (copy attached) includes water supply and distribution systems, sewerage systems as well as other utilities. Property may be taken for other purposes as well, such as parks, playgrounds, and cemeteries, but these are not typically regarded as infrastructure that is essential to urban living.

The process for eminent domain involves the filing of a declaration of taking by the government and the deposit by the government of a monetary amount representing the estimated value of the property interest taken. Most litigation regarding eminent domain involves disagreements over the value of the property taken. The law prescribes a process for determining value, and for litigating the issue if value cannot be agreed upon.

Where property is taken for a clear, essential "infrastructure" purpose, such as streets, water, and sewer, title vests immediately in the government upon the filing of the notice and deposit. Where property is intended for other types of public purposes, such as parks, the vesting of title occurs later, and sometimes may depend on a determination of the condemnor's authority to acquire the property (i.e., whether it is for a public purpose). Occasionally, eminent domain may be challenged on the basis that the taking is not for a legitimate public purpose. This is what happened in the recent, well publicized case involving New London, Connecticut, where property was taken from individual private owners for use in an economic development project.

The City of Asheville has not in recent years regularly had to exercise the power of eminent domain to acquire property for infrastructure. This is due largely to the fact that Asheville is already developed, and streets, sidewalks, and utilities already serve developed areas. Where new development does occur, it is usually the developer's responsibility to construct the required infrastructure, and to convey or dedicate it to the City. Where eminent domain has been used in the City, it is most frequently used to acquire land or easements for water and sewer lines.

The responsibility for installing and extending sewer lines within the City belongs to MSD. MSD is a local public condemnor, and has its own power of eminent domain, which it exercises regularly. From 1982 until 2005, extensions and improvements of water lines were the responsibility of the Regional Water Authority of Asheville, Buncombe and Henderson. The water authority also exercised eminent domain regularly. Because of the unusual structure of the water authority, however, these actions were commenced in the City's name. Water and sewer lines are regularly in need of upgrading, and service is regularly being extended to undeveloped properties. Also water and sewer lines have - - not uncommonly - - been in place for years, but there is no easement or other record of a property interest in the City or MSD for those lines, and it becomes necessary to acquire them or formalize the previous acquisition. For water line acquisition, condemnation has always been a last resort, used when negotiations failed or, in some cases, when ownership was uncertain. As for other types of infrastructure (streets, sidewalks, etc.) the City has infrequently used its eminent domain power in recent years. This is largely because it has been unnecessary. The City has several times authorized the initiation of a condemnation action to acquire land for sidewalks, but ultimately obtained the property by a negotiated sale.

Back in 2005, in the wake of the Supreme Court case involving New London, the City Council adopted a resolution expressing its position that it would not use eminent domain for economic development purposes (copy of resolution and excerpt from minutes attached). Otherwise, except for the consistent direction to use eminent domain only as a last resort, there has been no policy direction from City Council with respect to the use of eminent domain when acquiring property for infrastructure. The City has always been aware that eminent domain is a power available to it, and when negotiating for property needed for infrastructure or other purposes, the availability of this power is made known to the other parties.

If any further information is needed, or if there are any questions, please let me know. If the PED Committee desires a presentation on this information, that can occur at your next meeting.

RWO,jr/sc

Attachment2

cc: Gary W. Jackson, City Manager

ARTICLE 16.

Public Enterprises.

Part 1. General Provisions.

§ 160A-311. Public enterprise defined.

As used in this Article, the term "public enterprise" includes:

- (1) Electric power generation, transmission, and distribution systems.
- (2) Water supply and distribution systems.
- (3) Wastewater collection, treatment, and disposal systems of all types, including septic tank systems or other on-site collection or disposal facilities or systems.
- (4) Gas production, storage, transmission, and distribution systems, where systems shall also include the purchase or lease of natural gas fields and natural gas reserves, the purchase of natural gas supplies, and the surveying, drilling and any other activities related to the exploration for natural gas, whether within the State or without.
- (5) Public transportation systems.
- (6) Solid waste collection and disposal systems and facilities.
- (7) Cable television systems.
- (8) Off-street parking facilities and systems.
- (9) Airports.
- (10) Stormwater management programs designed to protect water quality by controlling the level of pollutants in, and the quantity and flow of, stormwater and structural and natural stormwater and drainage systems of all types. (1971, c. 698, s. 1; 1975, c. 549, s. 2; c. 821, s. 3; 1977, c. 514, s.

RESOLUTION NO. 05-154

RESOLUTION REGARDING THE CITY OF ASHEVILLE'S POSITION ON EMINENT
DOMAIN

RESOLVED BY THE CITY COUNCIL OF THE CITY OF ASHEVILLE THAT

(1) The Asheville City Council has no intention of utilizing eminent domain to take private property for any purpose other than a bona fide public purpose and, under no circumstance would private property be taken by eminent domain and utilized for the benefit of private development such as was allowed in the United States Supreme Court in the New London, Connecticut, case.

(2) The Asheville City Council encourages our local delegation to the North Carolina General Assembly to work to ensure that there is no legislation that would permit any government entity in North Carolina to use eminent domain in the manner approved by the United States Supreme Court in the New London, Connecticut, case.

Read, approved and adopted this 26th day of July, 2005.

Magdalen Boulson
CITY CLERK

Charles R. Worley
MAYOR

Approved as to form:

Russell
CITY ATTORNEY

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Magdalen Boulson
City Clerk

RESOLUTION NO. 05-154 – RESOLUTION REGARDING THE CITY'S POSITION ON EMINENT DOMAIN

At the suggestion of Councilman Dunn, Mayor Worley read the following resolution: "Be it resolved, that the Asheville City Council has no intention of utilizing eminent domain to take private property for any purpose other than a bona fide public purpose and, under no circumstance would private property be taken by eminent domain and utilized for the benefit of private development such as was allowed in the United States Supreme Court in the New London, Connecticut, case. Further, that the Asheville City Council encourages our local delegation to the North Carolina General Assembly to work to ensure that there is no legislation that would permit any government entity in North Carolina to use eminent domain in the manner approved by the United States Supreme Court in the New London, Connecticut, case.

Vice-Mayor Mumpower moved to adopt Resolution No. 05-154. This motion was seconded by Councilman Dunn and carried unanimously.

Ms. Leesa Kulba and Mr. Fred English both spoke in support of adoption of the resolution.

RESOLUTION BOOK NO. 29 – PAGE 188

CLAIMS

The following claims were received by the City of Asheville during the period of July 8-14, 2005: Patsy Medford (Transit Services), Greg Goodman (Streets), Adrian Pachico (Streets) and James Cutshall (Water).

These claims have been referred to Asheville Claims Corporation for investigation.